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Supreme Court, U.S.
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NO. 86-731

In the Supreme Court of the United States

OCTOBER TERM, 1986

FRANK MINGO, ET AL, individually and on behalf of all others similarly situated,
Appellants,

VERSUS

NEWTON JAMES, ET AL,
Appellees.

ON APPEAL FROM A THREE-JUDGE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO AFFIRM

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QUESTION PRESENTED

Whether the holding of the District Court that there was no change, de facto or de jure, in procedure subject to review under Section 5 of the Voting Rights Act[1] by the municipal governing body's effecting changes[2] in the manner of electing the municipal governing body by means of a municipal ordinance rather than a charter amendment is clearly - erroneous under F. R. Civ. P. 52 (a).

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[1] 42 USC §1973c (1976)

[2] The ordinances implementing the election changes was precleared by the Attorney General under the provision of Section 5 of the Voting Rights Act, 42 USC §1973(c).

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IN THE SUPREME COURT
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FRANK MINGO, ET AL, individually
and on behalf of all others similarly situated,
APPELLANTS

V.

NEWTON JAMES, ET AL.,
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ON APPEAL FROM A THREE-JUDGE
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF MISSISSIPPI

MOTION TO AFFIRM

Pursuant to Rule 16.1 of the Rules of this Court, Appellees move that the judgment of the three-judge court of United States District Court for the Southern District of Mississippi be affirmed on the ground that the judgment is plainly correct and the challange to it so insubstantial as to warrant no further argument.

STATEMENT OF THE CASE

Appellants' statement of the case (Jur. St. p 6-19) fails to include many material, relevant facts relied upon by the three-judge panel of the District Court and down plays others; thus a complete statement of the relevant facts before the lower court is appropriate.

The City of McComb City, Mississippi, operates under the provisions of a special charter granted by the Mississippi Legislature in 1872.

The provisions of the charter which concern the manner in which the Board of Selectmen are to be elected were amended in 1908[1] and in 1962. The lower court found that the charter provision in effect on October 25, 1985, (Jur. St. App. 8a to 9a) had been adopted by charter amendment in 1962 and provided:

> "The Board of Mayor and Selectmen of the City of McComb City, Pike County, Mississippi, shall have authority by ordinance to divide said city into not less than three wards; that one Selectman shall be elected from each Ward and the remaining number of selectmen shall be elected from the city at-large; That the total number of selectmen of said City shall be six; That all candidates for selectmen from wards shall reside within said wards; That all candidates shall qualify for either selectmen at-large or selectman for Ward; *And all said candidates for selectman for wards and at large shall be voted on by all of the electors of said city voting in such election.*"

The lower court held that the portion of the charter amendment *underlined* above which required the at-large

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[1] The charter as amended in 1908 read: "The board of Mayor and Selectmen of the City of McComb City, Pike County, Mississippi, shall have the authority by Ordinance to divide the said City into not less than three wards and to provide for the election of one selectman from each ward and the remaining number of selectmen from the City at-large."

election of all selectmen was void under the authority of *Stewart v. Waller,* 404 F. Supp. 206 (N.D. Miss. 1975). (Jur. St. App. 9a.)

On October 22, 1985, the Mayor and Board of Selectmen adopted a municipal ordinance increasing the number of selectmen elected from wards to five and delineating ward boundaries. This ordinance, in accordance with Sec. 21-13-1, et, seq, Miss. Code Ann. (1972) was published one time on October 25, 1985 in *The McComb Enterprise-Journal.*

After the compliance with all steps required for the enactment of a municipal ordinance under state law,[2] the ordinance was submitted on November 19, 1985 to the Attorney General of the United States for preclearance in accordance with Section 5 of the Voting Rights Act of 1965, as amended. 42 USC 1973 (c)

By letter dated January 21, 1986, the Attorney General made the following comment and request for additional information:

> "We also note that Section 21-17-9 of the Mississippi Code of 1972 appears to require that when a municipality amends its charter, the amendment must be published in a local newspaper for three weeks, and then submitted to the Governor and the State Attorney General for approval. According to information we have received, this may not have occurred with respect

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[2] Section 21-13-11 Miss. Code Ann. (1972)

> to the instant proposed charter change. Please provide evidence of compliance with the statute or evidence of the City's authority from the State to avoid this provision."[3]

On March 31, 1986, in response to the request for evidence of the city's authority, the Attorney General was sent copies of two official State of Mississippi Attorney General's Opinions dated March 28, 1986, which specifically addressed this issue. In these official opinions the Attorney General for the State of Mississippi stated that the private charter of the City of McComb gave the Mayor and Board of Selectmen the authority to increase the number of selectmen elected from wards by ordinance rather than by charter amendment.[4]

The Attorney General of the United States by letter dated April 21, 1986 did not interpose an objection to the change in the manner of electing the municipal governing body from three at-large positions to five single-member districts with one at large position, the districting plan; and the July 3, 1985, annexation of two tracts of land to the City of McComb, in Pike County, Mississippi.

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[3] Letter dated January 21, 1986, from Gerald W. Jones, Chief, Voting Section, Civil Rights Division, to Thomas H. Walman, City Attorney, McComb, Mississippi, introducted into evidence in the lower court as Exhibit "G-11".

[4] Official Attorney General's Opinions dated March 28, 1986, addressed to Honorable Quordiniah N. Lockley, Selectman, Ward III, McComb, Mississippi, and Honorable Billy B. Bowman, Attorney for the City of McComb, Mississippi, introduced into evidence in the lower court as Exhibit "G-12".

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT THERE WAS NO "CHANGE" IN PROCEDURE BY EFFECTING THE 1985 CHANGES BY MEANS OF ORDINANCE RATHER THAN BY MEANS OF A CHARTER AMENDMENT.

A. *CHARTER AUTHORIZED CHANGE BY ORDINANCE*

Initially, it must be noted that the Section 5 claim advanced by Appellants is not the ordinance adopted in October 1985 and precieared by the Department of Justice, but a claim that the ordinance adopted in October 1985 amended de facto the private charter. (Jur. St. 16-18.)

The fallacy of the Appellants' claim lies in their failure to accept the effect of the decision in *Stewart v. Waller,* 404 F. Supp. 206 (N.D. Miss. 1975) on the McComb private charter.

It is undisputed that in 1962 the City of McComb amended its private charter under the authority of the recently revised Section 21-3-7 of the Mississippi Code Annotated (1972) to provide that all selectmen, whether from wards or at-large, would be elected from the City at-large. (Jur. St. pp 14-15.) It is also undisputed that the Court in *Stewart v. Waller,* supra, declared Section 21-3-7 as amended by the legislature in 1962 unconstitutional. The Court in *Stewart* held void and unenforceable all local ordinances or charter amendments of any Mississippi municipality, including McComb, which required at-large elections adopted

in reliance on Section 21-3-7. 404 F.Supp. at 220.

This action of the *Stewart* court had the effect of declaring void and unenforceable the portion of the McComb City Charter adopted in 1962 which required "And all said candidates for selectmen for wards and at-large shall be voted on by all of the electors of said City voting in such election."(Jur. St. App. 9a)

Thus, in all elections conducted by the City of McComb from 1976 to October 1985 the unconstitutional portion of the charter was not followed and, as provided in the remaining constitutional portions of the charter, three selectmen were elected from wards and three selectmen were elected from the City at-large.[5]

The City of McComb was not required, as alleged by Appellants, to amend its charter in order to remove this unconstitutional provision. It is not necessary for a governmental body to pass legislation removing from its statute books laws which are declared unconstitutional by a court of competent jurisdiction.

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[5] The plaintiffs argue this change required by the *Stewart* court as another "de facto" change in the City's Charter that has not been precleared. (Jur. St. 17-18) The following by the City of McComb of a constitutional decision of a Court of the United States does not require Section 5 preclearance. *Conner v. Johnson*. 402 U.S. 690 (1971), *McDaniel v. Sanchez*, 452 U.S. 130 (1981). Section 51.16 - Court-ordered changes. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended. 28 C.F.R. § 51.16. In any event, the adoption of a valid ordinance in 1985 which was precleared makes this issue now moot. *City of Dallas v. United States*, 482 F. Supp. 183 (U.S.D.C.D.C., 1980) (three-judge court).

This Court in 1886 in *Norton v. Shelby County*, 118 U.S. 425, made the following comment of the effect of an unconstitutional act:

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation as inoperative as though it had never been passed."

Similar statements as to the legal effect of an unconstitutional act are found in *Chicago, Illinois &Railway Company v. Hackett*, 228 U.S. 559 (1913); *Fay v. Novia*, 372 U.S. 391 (1963).

A situation similar to the instant matter concerning the effect of a part of a private charter being declared unconstitutional was discussed by this Court in *Wise v. Lipscomb*, 437 U.S. 533 (1978).

> "It is suggested that the city was without power to enact the ordinance because the at-large system declared unconstitutional was established by the City Charter and because, under the Texas Constitution, Art. XI, §5, and Texas statutory law ... the Charter can not be amended without a vote of the people. But the District Court was of a different view. Although the Council itself had no power to change the at-large system as long as the charter provision remained intact, once the charter provision was declared unconstitutional, and, in effect null and void, the Council was free to exercise its legislative powers which it did by enacting the eight/three plan.
> 437 U.S. at 544

Since the all at-large features of the McComb Private Charter had been declared unconstitutional, and thus void and unenforceable, there was no need for the Mayor and Board of Selectmen to amend the charter to increase to five the number of single member wards. The charter clearly provides that the Mayor and Board of Selectmen have the authority by ordinance to divide said City into not less than three wards. Because the charter specifically provided that the number of selectmen, if greater than three, could be established by ordinance, there was no need to amend the charter.

B. THE DISTRICT COURT'S FINDING OF NO CHANGE IS NOT CLEARLY ERRONEOUS

The District Court made the following findings in Paragraph II:

> "The city charter was not amended, de jure or de facto, by the defendants actions in October 1985. The McComb city charter in effect in October 1985 provides authority for the defendnats to enact and implement an ordinance changing the system of electing the members of the board of selectmen [sic] a three/three system to a five/one system. There was no "change" in procedure by effecting the 1985 changes by means of ordinance rather than by means of charter, and therefore there was no change in a voting procedure subject to Section 5 of the Voting Rights Act."
>
> (Jur. St. App. 9a - 10a)

The Appellees submit that this finding is reviewable under the clearly-erroneous test of F. R. Civ. P. 52(a). The Rule 52(a) standard applies even if the findings, as in the instant case, are not based upon credibility determinations, but are based soley on documentary evidence. *Anderson v. Bessemer City,* 470 U.S. _____, 106 S. Ct. _____, (1985). Rule 52 broadly requires that findings not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings. It does not divide facts into categories; in particular, it does not divide findings or facts into those that deal with "ultimate" and those that deal with "subsidiary" facts. *Pullman-Standard v. Swint,* 456 U.S. 273, 287 (1982); *Rogers v. Lodge,* 458 U.S. 613, 622-623. (1982).

The Rule 52(a) clearly-erroneous standard for review has consistently been applied by this Court in reviewing lower court decisions involving claims of vote dilution arising under the Fourteenth and Fifteenth Amendments and claims arising under the Voting Rights Act. *White v. Regester,* 412 U.S. 755 (1973); *City of Rome v. United States,* 458 U.S. 156 (1980); *Rogers v. Lodge,* supra; *Thornburg v. Gingles,* _____ U.S._____(1986).

THE MANNER OF ADOPTING THE FIVE WARD PLAN BY ORDINANCE WAS PRECLEARED

In the alternative, the Appellees respectfully submit that the manner of adopting the five ward plan by ordinance rather than by a charter amendment was precleared under the provisions of Section 5 of the Voting

Rights Act.[6] By letter dated January 21, 1986, the Attorney General reviewed the statutory requirements for amending a private charter and requested compliance by the City of McComb with the statute or "evidence of the City's authority from the state to avoid this provision."[7]

In response to this request the Attorney General was furnished with copies of two official State of Mississippi Attorney General's Opinions, both dated March 28, 1986. In these opinions the Attorney General for the State of Mississippi stated that the private charter of the City of McComb gave the Mayor and Board of Selectmen the authority to increase the number of selectmen elected from wards by ordinance rather than by charter amendment."[8]

The ordinance increasing the number of selectmen elected from wards to five with one at-large and the districting plan were precleared by the Attorney General of the United States by letter dated April 21, 1986.[9] The Attorney General never objected to the use of an ordinance by the City of McComb to increase the number of selectmen elected from wards.

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[6] Although the Appellees' submission to the Attorney General was admitted into evidence before the District Court, the District Court did not find it necessary to decide this issue in reaching its decision.

[7] Statement of Case, page 3,4, supra.

[8] Statement of Case, page 4, supra.

[9] Statement of Case, page 4, supra.

Under the provisions of Section 5, a covered jurisdiction may enforce a change submitted for preclearance if the Attorney General has not interprosed an objection within sixty (60) days of submission. *Morris v. Gressette,* 432 U.S. 491 (1977).

The Appellees have never conceded that their actions constituted a change, de facto or de jure in the private charter. However, the authority of the Mayor and Board of Selectmen to make the change by ordinance was raised independently by the Attorney General. It was subsequently answered by the City and obviously evaluated by the Attorney General prior to his issuing the preclearance letter.

The Appellees deny that a change in the City's charter requiring Section 5 submission has occurred and concede that the manner, i.e. by ordinance, utilizied by the City of McComb in increasing the number of selectmen elected from wards was never specifically submitted for preclearance. However, the authority of the Mayor and Board of Selectmen to make this change by ordinance was submitted to the Attorney General for his consideration in an unambiguous, recordable manner with a request for his consideration pursuant to the Act. *McCain v. Lybrand,* _____U.S. _____, 404 S. Ct. 1037,(1984). The failure of the Attorney General to specifically object within sixty (60) days to the procedure by which the City of McComb increased its number of selectmen elected from wards to five by ordinance rather than a charter amendment constitutes preclearance under the provisions of the Act.

THE QUESTION PRESENTED BY APPELLANTS IS NOT SUBSTANTIAL

This case, contrary to the allegations of the

Appellants, does not raise as issues requiring this Court's consideration any new or novel issues delineating what "constitutes a change in a voting standard, practice or procedure", (Jur. St. 20), or an explanation of this Court's prior rulings in Section 5 cases (Jur. St. 25), nor is the question regarding submission under Section 5 of "subsequent de facto changes" present. (Jur. St. i). As presented to the lower court and preserved by this appeal, this case involves a determination of two issues:

a) the effect of the constitutional decision of *Stewart v. Waller*, 404 F. Supp. 206 (N.D. Miss. 1975) (three-judge court) on the private charter of the City of McComb, Mississippi; and

b) whether the private charter of the City of McComb City, Mississippi, in effect on October 22, 1985, authorized the Mayor and Board of Selectmen to establish additional wards by adoption of a municipal ordinance.

The hypothetical question raised by the Appellants on page 23 of their Jurisdictional Statement is precluded from being precleared by regulations adopted by the Department of Justice for the administration of Section 5 of the Voting Rights Act. 28 C.F.R. §51 et seq. Each submission is required to contain, in addition to other information, the following:

§51.25 Required contents

(g) A statement identifying the statutory or other authority under which the jurisdiction undertakes the change and a description of the procedures the jurisdiction was required to follow in deciding to undertake the change.
28 C.F.R. § 51.25.

However, if, as presented in the Appellants' hypothetical, any such legislation which was not authorized or in accordance with a city's charter or a state's constitution was precleared, the matter is one of state law and the aggrieved party would have an appropriate state forum within which to litigate this matter.

CONCLUSION

Appellants present no substantial question for decision by this Court. The judgment of the three-judge panel of the United States District Court for the Southern District of Mississippi is correct and should therefore be affirmed.

Dated: November 24, 1986.

Respectfully submitted,

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